



**NOTICE OF APPEAL FROM THE EXAMINER
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

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APPELLANT: Kazich

ATTY. DOCKET NO.: VAK-P-03-001

SERIAL NO.: 10/800,225

GROUP ART UNIT: 1794

DATE FILED: March 12, 2004

EXAMINER: Weinstein

INVENTION: "AN APPARATUS, A SYSTEM AND A METHOD FOR COLLECTING DRIPS
FROM A FROZEN TREAT"

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPELLANT'S REPLY BRIEF TRANSMITTAL LETTER

SIR/MADAM:

Appellant submits herewith Appellant's Reply Brief in response to the Examiner's Answer dated September 22, 2008. Appellant submits that no fee is required for submission of this Reply Brief. However, the Commissioner is hereby authorized to charge any fees which may be required, or to credit any overpayment to Deposit Acct. No. 50-0595. A duplicate copy of this sheet is enclosed for this purpose.

Respectfully submitted,

(Reg. No. 35,018)

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CERTIFICATE OF MAILING

I hereby certify that this REPLY BRIEF and RETURN RECEIPT POSTCARD are being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: Mail Stop Appeal Brief-Patents, Commissioner for Patents, Alexandria, VA 22313 on November 21, 2008.

Brian M. Mattson (Reg. No. 35,018)



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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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REPLY BRIEF

SIR/MADAM:

This Reply Brief is submitted in response to the Examiner's Answer dated September 22, 2008. In the Examiner's Answer, the Examiner raised at least two new points of argument.

I. STATUS OF CLAIMS

Claims 1-20 are pending in this patent application. Claims 1-20 were finally rejected by the Examiner in a Final Rejection dated October 26, 2007 and are hereby on appeal.

II. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

1. Do Claims 1-20 contain new matter under 35 U.S.C. §112, first paragraph, that is not supported by the specification as originally filed?

2. Would Claims 1-3, 8, 13, 17 and 18 have been obvious under 35 U.S.C. §103(a) to one having ordinary skill in the art at the time of Appellant's invention over *Ackalusky* (U.S. Patent No. 2,803,550) in view of *Taylor* (U.S. Patent No. 2,735,778) or vice versa, i.e., *Taylor* in view of *Ackalusky*, both further in view of *Perkins* (U.S. Patent Publication No. 2003/0087011), *Pagnini* (U.S. Patent No. 3,306,512), *Blant* (Great Britain Patent No. 2,293,751), *Rizzuto* (U.S. Patent No. 4,938,411), *Oshio* (U.S. Patent Publication No. 2002/0029697), *Suzuya Shokuhin* (Japanese Patent No. 11-137179) and *Smith* (U.S. Patent No. 5,770,250), essentially for the reasons detailed in the Non-Final Office Action mailed December 5, 2006, further in view of *Goodwin* (U.S. Patent No. 4,756,939), *Miller* (U.S. Patent No. 4,321,997), *Rhodes et al.* (U.S. Patent No. 4,940,621) and *Hansen et al.* (U.S. Patent No. 4,865,855)?

3. Would Claims 4-7, 9-12, 14-16, 19 and 20 have been obvious under 35 U.S.C. §103(a) to one having ordinary skill in the art at the time of Appellant's invention in view of *Ackalusky*, *Taylor*, *Perkins*, *Pagnini*, *Blant*, *Rizzuto*, *Oshio*, *Suzuya Shokuhin*, *Smith*, *Goodwin*, *Miller*, *Rhodes et al.*, and *Hansen et al.* further in view of *Huffer et al.* (U.S. Patent No. 6, 457,585), *Penick et al.* (U.S.

Patent No. 4,336,664), *Freedman et al.* (U.S. Patent No. 2,585,924),
Lipper (U.S. Patent No. 6,814,234), *Moravick et al.* (U.S. Patent
No. 3,704,892), *Shin* (U.S. Patent No. 4,648,548), *Knoerzer et al.*
(U.S. Patent No. 6,746,743), *Gottschalk* (U.S. Patent No.
3,835,564), *Goldstein* (U.S. Patent No. 3,100,642), *Witkowski et al.*
(U.S. Patent No. 5,676,401), *McClung et al.* (U.S. Patent No.
6,755,711) and *Bellet* (U.S. Patent No. 2,711,541)?

III. ARGUMENT

A. THE REQUIREMENTS IN CLAIMS 1, 8 AND 13 THAT THE BOTTOM OR BASE IS "RIGID" ARE SUPPORTED BY THE SPECIFICATION AS ORIGINALLY FILED

In the Examiner's Answer, the Examiner stated:

The recitations, in claims 1, 8 and 13, that the bottom or base is "rigid", appears to be New Matter, not supported by the specification. The word "rigid" is thought to be generally understood to mean not flexible or not bending. The specification and claims as originally filed does not use the word "rigid", nor is there any indication in the specification as to whether the bottom or base is inflexible or non-bending. The specification does disclose that the base may be made from cellulose fiber and/or plywood, plastic, etc. However, since there is no disclosure in the specification as to how thick the bases are, and since it is common knowledge that whether a material is flexible or not is a function of the thickness of the material, and even products such as plywood, if sufficiently thin is flexible, there is therefore no evidence that appellant has support for a rigid base, in the specification as originally filed...

See Examiner's Answer, page 4.

Appellant respectfully submits that materials, such as, cellulose fiber, plywood and plastic are known to be rigid materials and may be "not flexible or not bending" (as alleged by the Examiner) to persons having ordinary skill in the art. The Examiner alleges that, "it is common knowledge that whether a material is flexible or not is a function of the thickness of the material...". Even further, the Examiner admits that, "even products such as plywood, if sufficiently thin is flexible...". Appellant submits that the Examiner himself admits that plywood is

both a rigid and a flexible material. It is respectfully submitted that plywood, specifically, is more commonly known as a rigid material as opposed to a flexible material to someone having ordinary skill in the art.

Therefore, Appellant submits that the requirement in Claims 1, 8 and 13 that the bottom or base is "rigid" is supported by the specification as originally filed because plywood is a rigid material as admitted by the Examiner and plywood, plastic, cellulose fiber, polyethylene and polyurethane are known to include rigid materials as known to a person of ordinary skill in the art. Moreover, Appellant submits that a person of ordinary skill in the art knows that materials, such as, plywood, plastic, cellulose fiber, polyethylene and polyurethane may be manufactured in various rigid embodiments having a wide range of thicknesses. Accordingly, Appellant submits that the requirements in Claims 1, 8 and 13 that the bottom or base is "rigid" are supported by the specification as originally filed.

B. THE REQUIREMENTS IN CLAIMS 1, 8 AND 13 THAT THE LIP EXTENDS "ABOVE" THE TOP LAYER OR THE ABSORBING MEANS ARE SUPPORTED BY THE SPECIFICATION AS ORIGINALLY FILED

In the Examiner's Answer, the Examiner stated:

The specification as originally filed does not use the word "above". The specification only discloses that the lip extends "outward" with respect to the top layer. "Outward" does not mean "above". The word "outward" in referring to the lip or rim of the base makes more sense in terms of the lip extending away from the base in a configuration that has the sloped or inclined away from the base and top layer. Since

there is no other disclosure as to this configurational relationship, and since there is no cross-sectional view of the assembly, only an exploded view which is inconclusive at best, there is therefore no evidence that appellant has support for the word "above" in the specification as originally filed. Arguments to the effect that the fact the specification discloses pooled liquid does not drip out is support for the recitation that the lip is "above" the top layer is not convincing since an outwardly tapered lip would accomplish the same function.

See Examiner's Answer, page 5.

In addition to the disclosure recited by the Patent Office as excerpted above, Appellant submits that the specification as originally filed also discloses that, with regard to FIG. 1, "The lip 22 may extend outward with respect to the top side 18 of the base 12" (See page 10, lines 14 and 15). FIG. 1 clearly discloses that: the lip is perpendicular to the base, as required by Claim 1; the lip extends outward perpendicularly with respect to the top side of the base, as required by Claim 8; and the lip is perpendicular to the base, as required by Claim 13.

Appellant's specification clearly and unambiguously discloses the embodiment wherein the lip extends above the top layer. As noted above, Appellant's use of the term "outward," as illustrated in FIG. 1, means that the lip extends perpendicularly above the base. The term "outward" is also used relating the lip to the top layer itself. At page 4, lines 4-6, Appellant describes, "Further, the apparatus has a lip on the perimeter of the base wherein the lip extends outward with respect to the top layer of the base."

Since the term "extend outward" is shown in FIG. 1 as being perpendicular and extending above the base 12, this embodiment clearly and unambiguously declares the lip extending perpendicularly above the top layer.

Contrary to the fact that FIG. 1 and the specification, as originally filed, disclose that the lip 22 extends outward in a direction perpendicular to the top side 18 of the base 12 and outward with respect to the top layer, the Examiner alleges that, "the word "outward" in referring to the lip or rim of the base makes more sense in terms of the lip extending away from the base in a configuration "that has the sloped or inclined [sic] away from the base and top layer". The Examiner cites an example not taught by the disclosure to allege that pooled liquids would not drip out of a lip that extends outward from the base and/or the top layer but not "above" the top layer.

However, the specification, as originally filed, discloses a lip that extends outward and perpendicular with respect to the base and the layer and further discloses that the drips may collect and/or may form pools on the top side 18 of the base 12. (See page 13, lines 20-22). The lip 22 may prevent the drips which have pooled on the top side 18 of the base 12 from flowing beyond the perimeter 14 of the base 12. (See page 14, lines 21-23). Therefore, Appellant's specification, as originally filed, supports and in fact necessarily discloses that the lip extends "above" the

top layer, as required by Claims 1, 8 and 13, to pool drips and prevent drips from flowing beyond the perimeter of the base.

The Examiner's example of a sloped or inclined lip that does not extend "above" the top layer would not in fact prevent drips from flowing beyond the perimeter of the base. A lip that extends outward in a "sloped or inclined" fashion would allow a top surface of a pool of drips to extend beyond a perimeter of the base. Moreover, and based on the specification as filed, a person of ordinary skill in the art knows that Appellant's lip extends "above" the top layer to prevent drips from flowing beyond the perimeter of the base. Accordingly, Appellant submits that the requirements in Claims 1, 8 and 13 that the lip extends above the top layer or absorbing means are supported by the specification as originally filed.

**C. THE CITED REFERENCES AND THE REJECTION
OF THE CLAIMS UNDER 35 U.S.C. §103(a)**

Claims 1-3, 8, 13, 17 and 18 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Ackalusky* in view of *Taylor* or vice versa, i.e., *Taylor* in view of *Ackalusky*, both further in view of *Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin* and *Smith*, further in view of *Goodwin, Miller, Rhodes et al.* and *Hansen et al.* Moreover, Claims 4-7, 9-12, 14-16, 19 and 20 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin,*

Smith, Goodwin, Miller, Rhodes et al., and Hansen et al. further in view of *Huffer et al., Penick et al., Freedman et al., Lipper, Moravick et al., Shin, Knoerzer et al., Gottschalk, Goldstein, Witkowski et al., McClung et al.* and *Bellet*. Appellant reiterates and hereby incorporates by reference the arguments made in Appellant's Appeal brief filed on June 25, 2008 with respect to these rejections. Appellant respectfully submits that the rejections of these Claims in view of the combination of the thirteen references, with respect to Claims 1-3, 8, 13, 17 and 18, and twenty-five references with respect to Claims 4-7, 9-12, 14-16, 19 and 20, are clearly improper for the reasons stated in Appellant's Appeal Brief, and should be reversed.

IV. CONCLUSION

For the foregoing reasons, Appellant respectfully submits that the rejection of Claims 1-20 is erroneous as a matter of law and fact and respectfully requests the Board to reverse the rejection.


Respectfully submitted,

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